WISCONSIN STATE REPRESENTATIVE
Louis J. Molepske, Jr.
71ST ASSEMBLY DISTRICT

Written Testimony of Representative Louis J. Molepske, Jr.
Senate Bill 119

I want to begin by thanking Chairperson Miller and the members of the Senate Environment and Natural Resources Committee for scheduling a public hearing for this important legislation. I am thankful that Senators Wirch and Cowles have introduced this proposal in the Senate. As you know I have introduced Assembly Bill 86 on the same subject.

We cannot read the papers or listen to our constituents without hearing the words "invasive species" and the ecological and economical disasters that follow. These invaders are not staying put in the Great Lakes, but are finding their way to lakes, rivers and other water bodies throughout Wisconsin. From Minocqua Lake in Oneida County to Lake Geneva in Walworth County, water-borne invasive species are causing havoc to the multi-billion dollar tourism, recreation and commercial fishing industries. We have recently witnessed the discovery of VHS, a deadly disease that affects the fish population, in Wisconsin. Scientists have suggested that VHS may have been introduced to North America via ballast water.

There are currently **183** aquatic nuisance species in the Great Lakes, including the zebra mussel, sea lamprey and spiny water flea. On average, a new species is introduced to the Great Lakes every **six and a half months**. The statistics regarding both the ecological and economic impact that invasive species have had are staggering. For example:

- From 1992 to 2000, **80%** of the plankton in Lake Michigan has been lost as a direct result zebra muscles.
- According to the National Wildlife Federation, invasive species have cost citizens and businesses in the Great Lakes region as much as **$10,000,000 billion dollars** in the past ten years.
- It has been estimated that the cost of dealing with zebra and quagga mussels in the Great Lakes alone has been approximately $2 billion.
- On the state level, since the fiscal year 2004, the Wisconsin Department of Natural Resources has awarded **$2,451,198 million dollars** worth of grants aimed at combating the effects of invasive species in our State. When combined with local matching funds, volunteer donations and in-kind services, the total approaches **$5,000,000 dollars**.

DISTRICT:
(715) 342-8985
1557 Church Street
Stevens Point, WI 54481
Rep.Molepske@legis.wi.gov

STATE CAPITOL:
P.O. Box 8953
Madison, WI 53708
FAX: (608) 282-3671
Toll-free: (888) 534-0071 or (608) 267-9649

On the national level, a recent Federal Court decision ruled that the Environmental Protection Agency (EPA) is required to protect the Great Lakes by regulating the ways in which ships can dispose of ballast water. The judge also concluded that the discharged water should be considered **biological pollution** because of the invasive species found in the ballasts of freighters.

Although there are limited federal regulations in place, huge loopholes in the law still allow for approximately 80% of ships entering the Great Lakes to be exempt from treating their ballast water, suspended solids or biological particulates.

How much greater must the problem get before we act?

The federal government and the shipping industry have had ample opportunity to address this problem, but unfortunately they have been unwilling to do so. As such, as a fellow Great Lakes state, we have an *obligation* to take immediate action to protect our environment *and* our economy. According to a recent student completed by the Army Corps of Engineers, recreational boating in the Great Lakes region is a **$5.5 billion dollar** industry. The eight Great Lakes states are home to nearly **4.3 million** private boats, nearly a third of the number of private boats in the United States. Commercial navigation on the Great Lakes generates nearly **$3.4 billion dollars** in business revenue per year. Unless we take immediate action to address this critical issue, we put that invaluable industry at tremendous risk. Thus, as you can see, contrary to what the shipping industry may tell you, it is important to remember that this legislation *is not* anti-shipping, *but rather anti-shipping that destroys lakes*.

As you all know, Michigan passed Senate Bill 332 in 2005 with overwhelming support, including that of the Michigan Chamber of Commerce, to address this problem. In response to that legislation, the shipping industry has filed a lawsuit against the State of Michigan under the Commerce Clause. However, according to Senator Patricia L. Birkholz, the author of Senate Bill 332, "[i]f anything…it should be the State of Michigan suing the shippers for bringing in so many unwanted organisms." By not working with the State of Wisconsin in cleaning up ballast water, the shipping industry is externalizing a cost of doing business to the Great Lakes ecosystem; the Wisconsin fishing industry, both professional and recreational; the Wisconsin tourism industry; the multiple users of water, both municipally and private; and to each of Wisconsin's 72 counties' inland water bodies.

Thank you very much for your time this morning. Along with my testimony, I have included copies of the following documents:

- The federal case requiring ballast water to be regulated under the Clean Water Act;
- A recent *U.S. News & World Report* article detailing state efforts to clean up ballast water;

- A resolution passed by one of Wisconsin's 72 counties requesting a fishing license increase to cover the costs of damages caused by invasive species;

- Testimony from Senator Patricia L. Birkholz, author of the Michigan legislation on ballast water, offering her full support for Wisconsin's efforts to take action on this critical Great Lakes initiative;

- A resolution passed by the Wisconsin State Division of the Izaak Walton League of America supporting the enactment of both Senate Bill 119 and Assembly Bill 86;

- A resolution passed by the Portage County Land Conservation Committee supporting State efforts to address the non-native aquatic invasive species problem;

- A Final Determination and Notice Regarding Ballast Water Treatment for Oceangoing Vessels on the Great Lakes prepared by the Director of the Michigan Department of Environmental Quality;

- A 2007 List of Vessels Reported as Complying with the Requirements of 1994 PA 451, Section 3103a of the Natural Resources and Environmental Protection Act; and

- A copy of the 2007 Ballast Water Management Practices Report Form for the State of Michigan.

I would be happy to answer any questions that you may have.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

NORTHWEST ENVIRONMENTAL ADVOCATES; THE OCEAN CONSERVANCY; and WATERKEEPERS NORTHERN CALIFORNIA and its projects CENTER FOR MARINE CONSERVATION, and SAN FRANCISCO BAYKEEPER and DELTAKEEPER,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendant.

_____/

No. C 03-05760 SI

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Currently pending before this Court are the parties' cross-motions for summary judgment. Having carefully considered the argument of the parties and the papers submitted, the Court hereby GRANTS plaintiffs' motion and DENIES defendant's motion.

BACKGROUND

In 1972, Congress enacted significant amendments to the Clean Water Act ("CWA" or "Act") in order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA prohibits the discharge of any pollutant from a "point source" into navigable waters of the United States without a National Pollutant Discharge Elimination Systems ("NPDES") permit. Northern Plains Resource Council v. Fidelity Exploration & Development Company, 325 F.3d 1155, 1160 (9th Cir. 2003).

The term "point source" includes a "vessel or other floating craft." 33 U.S.C. § 1362(14). "Discharge of any pollutant" is defined as: "(A) any addition of any pollutant to navigable waters from any point source, [and] (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12). The term "pollutant" includes "biological materials." 33 U.S.C. § 1362(6). The CWA excludes from the definition of "pollutant" any "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces." 33 U.S.C. § 1362(6).

The Environmental Protection Agency ("EPA") has primary authority to implement and enforce the CWA. 33 U.S.C. § 1251(d). Pursuant to this authority, the EPA implemented 40 C.F.R. § 122.3(a), which states:

> The following discharges do not require NPDES permits:
>
> (a) Any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel. This exclusion does not apply to rubbish, trash, garbage, or other such materials discharged overboard; nor to other discharges when the vessel is operating in a capacity other than as a means of transportation such as when used as an energy or mining facility, a storage facility or a seafood processing facility, or when secured to the bed of the ocean, contiguous zone or waters of the United States for the purpose of mineral or oil exploration or development.

40 C.F.R. § 122.3(a).

The portion of 40 C.F.R. § 122.3(a) that is particularly relevant in this matter is its exclusion from the NPDES permitting requirements for "any other discharge incidental to the normal operation of a vessel." In particular, the EPA has relied on this regulation to exempt a variety of pollutant discharges, including ballast water, from NPDES permitting requirements. Ballast water is taken on or discharged by ships in order to accommodate changes in its weight when cargo is loaded and unloaded. Ships collect ballast water in dedicated ballast water tanks, empty cargo tanks, or empty fuel tanks. A tanker ship in the Great Lakes can contain as much as 14 million gallons of ballast water, which would be discharged at port when the ship takes on cargo. Seagoing tankers can have double the amount of ballast water. The amount of ballast water discharged in this country's waters exceeds 21 billion gallons each year. See Sivas Decl., Ex. C, EPA, Aquatic Nuisance Species in Ballast Water Discharges: Issues and Options ("EPA Report") at 4 (Draft Report,

September 10, 2001).

The impact of this immense amount of ballast water discharged in this country's waters each year is that "more than 10,000 marine species each day hitch rides around the globe in the ballast water of cargo ships." Id. In fact, "the primary vector for ANS [Aquatic Nuisance Species] transport at this time is probably ballast water." Id. Invasive species transported by ballast water have "taken over wetland habitats, and deprived waterfowl and other species of food sources." United States General Accounting Office, Invasive Species: Obstacles Hinder Federal Rapid Response to Growing Threat, GAO-01-724, July 2001) at 3 (hereinafter "GAO Report").

The GAO Report stated that: "Zebra mussels are a widely known aquatic invasive. Transported into the Great Lakes in ships' ballast water, zebra mussels have clogged the water pipes of electric companies and other industries; infestations in the Midwest and Northeast have cost power plants and industrial facilities almost $70 million between 1989 and 1995." Id. Other governmental agencies have recognized that "[t]he ecological damage caused by invasive species can be enormous." EPA Report at 9.

In January 1999, plaintiffs, among others, filed a petition requesting the EPA to repeal 40 C.F.R. § 122.3(a) because it conflicts with the Clean Water Act, which does not exempt "discharges incidental to the normal operation of a vessel" from the requirement to obtain an NPDES permit. Sivas Decl., Ex. J ("Petition to Repeal 40 C.F.R. § 122.3(a)") at 1-2. In response to the petition, the EPA prepared the EPA Report for public comment. After considering public comments, the EPA denied the petition to repeal the exemption. 68 Fed. Reg. 53,165 (September 9, 2003).

After the denial of its petition, plaintiffs filed a complaint in this Court against the EPA, requesting a declaration that the EPA's failure to rescind 40 C.F.R. § 122.3(a) in response to plaintiffs' petition was in clear violation of the CWA, and an injunction directing the EPA to repeal and rescind 40 C.F.R. § 122.3(a).[1] Plaintiffs assert two claims: 1) that the EPA's promulgation of 40 C.F.R. § 122.3(a) is inconsistent with the EPA's statutory authority in the CWA and thus unlawful and subject to review under the Administrative

[1] Apparently in recognition of the subject matter jurisdiction issues discussed below, plaintiffs filed an alternative petition for review with the Ninth Circuit in December 2003. The Ninth Circuit granted plaintiffs' motion for voluntary dismissal without prejudice to reinstatement on May 4, 2004, in order to allow this Court to reach a final judgment in this case.

Procedure Act ("APA"), 5 U.S.C. § 706(2); and 2) that the EPA's denial of plaintiffs' petition was arbitrary, capricious, and an abuse of discretion given the CWA and subject to judicial review under § 706(2) of the APA.

The parties have since filed cross-motions for summary judgment. The Court has granted the Great Lakes States' request to file an amicus curiae brief in support of plaintiffs' motion for summary judgment. These motions are now before the Court.

LEGAL STANDARD

1. Summary judgment

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The moving party, however, has no burden to negate or disprove matters on which the non-moving party will have the burden of proof at trial. The moving party need only point out to the Court that there is an absence of evidence to support the non-moving party's case. See id. at 325.

The burden then shifts to the non-moving party to "designate 'specific facts showing that there is a genuine issue for trial.'" Id. at 324 (quoting Fed. R. Civ. P. 56(e)). To carry this burden, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). "The mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

In deciding a motion for summary judgment, the evidence is viewed in the light most favorable to the non-moving party, and all justifiable inferences are to be drawn in its favor. Id. at 255. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge [when she] is ruling on a motion for summary judgment." Id.

2. Review of administrative action

Judicial review of the EPA's promulgation of 40 C.F.R. § 122.3(a) and the subsequent denial of plaintiffs' petition to repeal the regulation is governed by the Administrative Procedure Act, 5 U.S.C. § 706(2). The court "shall" set aside any agency decision that the Court finds is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" or a decision that is "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(A) and (C).

Chevron, U.S.A., Inc. v. National Resources Defense Council, 467 U.S. 837 (1984) ("Chevron"), provides the standard for a court's review of an agency's construction of a statute:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 842-42.

DISCUSSION

1. Subject matter jurisdiction

Plaintiffs assert that this Court has subject matter jurisdiction over their claims under 28 U.S.C. § 1331,[2] since the complaint challenges the EPA's actions under the CWA and the APA, both federal statutes. Section 1331 effectively provides the default for federal jurisdiction in these matters: "[U]nless Congress specifically maps a judicial review path for an agency, review may be had in federal district court under its general federal question jurisdiction, 28 U.S.C. § 1331." Owner-Operators Independent Drivers Ass'n of America, Inc. v. Skinner, 931 F.2d 582, 585 (9th Cir. 1991). Plaintiffs argue that no alternate "judicial review path" has been mapped by Congress for this case, so that this Court has jurisdiction under § 1331 to review "a final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

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[2] "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. §1331.

Defendant, however, contends that there is an alternative court to review the EPA's action. Defendant claims that the Courts of Appeals have exclusive jurisdiction over this matter under 33 U.S.C. § 1369(b)(1):

> Review of the Administrator's action . . . (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of [the Act], [and] (F) in issuing or denying any permit under section 1342 of [the Act] . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person.

Defendant claims that §§ 1369(b)(1)(E) and (F) both provide that plaintiffs' claims are within the Ninth Circuit's exclusive jurisdiction. Plaintiffs respond that the review channeling provisions of § 1369(b)(1) should be narrowly construed, and that they do not apply under the circumstances surrounding this case.

A. 33 U.S.C. § 1369(b)(1)(E)

Defendant argues that subsection (E) places jurisdiction with the Court of Appeals because 40 C.F.R. § 122.3(a) involves "effluent limitations and other limitations" contained in NPDES permits. Defendant relies on Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency, 673 F.2d 400 (D.C. Cir. 1982) ("NRDC v. EPA") in support of its argument that "effluent limitations" include regulations that implement NPDES permit programs. In NRDC v. EPA, the D.C. Circuit found that it had original jurisdiction under § 1369(b)(1)(E) to review NPDES regulations that established "a complex set of procedures for issuing or denying NPDES permits." Id. at 402. The court held that original jurisdiction in the Courts of Appeals was proper because a contrary finding would "produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits . . . but would have no power of direct review of the basic regulations governing those individual actions." Id. at 405-06. See also Environmental Defense Center, Inc. v. United States Environmental Protection Agency, 344 F.3d 832, 843 (9th Cir. 2003) ("EDC v. EPA") (Ninth Circuit had jurisdiction under § 1369(b)(1) to hear challenge to EPA regulation regarding NPDES permits for storm sewers, which excluded certain facilities from regulation).

Plaintiffs argue that § 1369(b)(1)(E) does not apply in this case because the provision in 40 C.F.R. §

122.33(a) that "any discharge incidental to the normal operation of a vessel" is exempted from NPDES permit requirements cannot be construed as an "effluent limitation or other limitation" under § 1369(b)(1)(E). Plaintiffs assert that an outright exemption for an entire class of discharges is not a limitation, because "limitation" is defined as "[t]he act of limiting; the state of being limited" or a "restriction." Black's Law Dictionary (7th Ed. 1999).

The Court recognizes that the Ninth Circuit has "counseled against the expansive application of § 1369(b)." League of Wilderness Defenders v. Forsgren, 309 F.3d 1181, 1190 n. 8 (9th Cir. 2002). Defendant has not cited any cases that deal with an exemption from NPDES permit requirements for an entire class of discharges. In NRDC v. EPA, the court found that the regulations issued by the EPA "restrict who may take advantage of certain provisions or otherwise guide the setting of numerical limitations in permits . . . [T]he [regulations] are a limitation on point sources and permit issuers and a restriction on the untrammeled discretion of the industry." 673 F.2d at 404-05. In the current case, the exemption in question cannot be classified as presenting any restriction or any limitation; instead, it is a categorical exemption for all discharges incidental to the normal operation of a vessel, including ballast water discharges.

In EDC v. EPA, the EPA issued regulations regarding storm sewer systems. The regulations required permits for a variety of storm sewer systems, including small municipal systems and construction sites. 344 F.3d at 842. As a result, municipal governments brought a challenge against the permit requirements, and an environmental advocacy group argued that the permit process did not provide for adequate public oversight. Id. at 843, 852. The environmental advocate plaintiffs also challenged the EPA's decision to delegate to local authorities supervision of a small group of commercial and governmental facilities. Id. at 858-59. Defendant argues that this last claim by the plaintiffs in EDC v. EPA is similar to the plaintiffs' claim in this case, and, therefore, § 1369(b)(1)(E) applies.

The Court finds EDC v. EPA distinguishable, because that case involved a complicated regulatory structure for storm sewer systems. Although the EPA exempted a narrow group of facilities from NPDES permit requirements, it clearly limited the amount of storm sewer pollutants, unlike the case before this Court. EDC v. EPA also contained permit requirements for storm sewer pollutants, unlike the blanket exemption for ballast water discharges in this case. Therefore, the Court finds that 40 C.F.R. § 122.3(a) is not an "effluent

limitation. . . [e]ven under the expansive definition of NRDC v. EPA." Environmental Protection Information Center v. Pacific Lumber Company, 266 F.Supp.2d 1101, 1119 (N.D. Cal. 2003) ("EPIC") (EPA regulation that exempted a number of silvicultural activities from the definition of "silvicultural point source" did not constitute an "effluent limitation" under § 1369(b)(1)(E)).

Given that the EPA regulation in question did not constitute an "effluent limitation or other limitation," the Court finds that the Court of Appeals does not have exclusive jurisdiction over the matter under § 1369(b)(1)(E).

B. 33 U.S.C. § 1369(b)(1)(F)

Although it acknowledges that the provision is "not without ambiguity," defendant argues that § 1369(b)(1)(F) locates plaintiffs' claims within the Ninth Circuit's exclusive jurisdiction because the regulation in question deals with the issuance or denial of a permit under § 1342. Def.'s Mot. at 14. Defendant claims that the review of the regulation requires a court to define the scope of the applicability of the NPDES permitting program, which has been recognized by the Ninth Circuit as subject to review under subsection (F).

Defendant relies primarily on two Ninth Circuit cases, NRDC v. EPA, 966 F.2d 1292 (9th Cir. 1992) and American Mining Congress v. EPA, 965 F.2d 759 (9th Cir. 1992) ("AMC v. EPA"). In both cases, the court relied on subsection (F) to review EPA regulations. In NRDC v. EPA, plaintiffs challenged EPA regulations which related to storm water discharges by industrial activities and municipalities and which exempted some activities from immediate NPDES permitting requirements. 966 F.2d at 1301-1308. In AMC v. EPA, the challenged regulations imposed permit requirements for discharges from inactive mines, but contained exceptions for two types of inactive coal mines pending expiration of a storm water permit moratorium in October 1992. 965 F.2d at 762-3.

However, both NRDC v. EPA and AMC v. EPA involved temporary exclusions from the NPDES permit requirements, not the permanent exclusions found in this case. Therefore, these cases do not support defendant's assertion that the regulation in question, which eliminates an entire type of discharge from the NPDES permit requirements, is a provision governing the issuance of permits or regulates the underlying permit procedures. There is no discharge subject to the permit requirements in this case, so it is not possible for the

EPA to have procedures or permits for the court to evaluate under subsection (F).

This Court has already addressed this issue in factual circumstances very similar to the current case. In EPIC, an environmental group brought an action challenging 40 C.F.R. § 122.27(b)(1), which exempted from NPDES permitting requirements a number of silvicultural activities, such as nursery operations, reforestation, surface drainage, and road construction and maintenance from which there is natural runoff. 266 F.Supp.2d at 1107-08. Defendants brought a motion to dismiss, claiming that the district court lacked subject matter jurisdiction because the challenge was a review of an EPA action under subsection (F). Id. at 1113. Judge Patel, in a carefully reasoned opinion, found that subsection (F) did not apply because "the EPA action at issue is properly characterized as a regulation identifying a class of silvicultural sources that do not require NPDES permits." Id.

As is true in the current case, the plaintiffs' challenge in EPIC dealt with a wholesale exclusion from the NPDES permit requirements: in EPIC, surface drainage from silvicultural activities; in this case, ballast water discharges. In EPIC , Judge Patel found that NRDC v. EPA and AMC v. EPA were distinguishable, because in those cases "the regulations directly governed permit procedures by determining when permitting would occur. In the action at bar, there can be no underlying permit procedures for silvicultural sources, because they are not subject to an NPDES program." Id. at 1115. For the same reason, the court rejected defendants' argument that there would be an illogical tension between district court and circuit court review:

> Given the specific language of the jurisdictional provision and the rationale behind circuit court review of underlying procedures, however, such an outcome is reasonable. Because [plaintiff] challenges a decision that in effect excludes sources from the NPDES program, the circuit courts will never have to confront the issuance or denial of a permit for these sources . . . . Thus, a district court taking jurisdiction over a challenge to the silvicultural regulation does not create the same awkwardness for a circuit court as that described in the D.C. Circuit case of NRDC v. EPA [673 F.2d 400 (D.C. Cir. 1982).

Id. at 1115-16.

The Court agrees with Judge Patel's analysis, and finds that subsection (F) does not apply in the current case because of the EPA's wholesale exclusion of ballast water from the NPDES permit requirements. Although § 1369(b)(1) is not a "model of clarity," it is not so cloudy as to require this Court to find that plaintiffs' challenge to 40 C.F.R. § 122.3(a) is a review of an EPA action "in issuing or denying any permit

under § 1342"; the EPA could never issue or deny a permit for ballast water discharges given that they are exempt from the NPDES permit requirements and absolutely no procedures exist to provide such permits.

Therefore, the Court finds no basis in § 1369(b)(1)(F) to require that initial review of plaintiffs' challenge to 40 C.F.R. § 122.3(a) be had in the Court of Appeals.

2. Statute of limitations

Plaintiffs have brought two causes of action against defendant pursuant to 5 U.S.C. § 706(2). The first cause of action asserts that the EPA's promulgation of 40 C.F.R. § 122.3(a) was "inconsistent with, and in excess of EPA's statutory authority under, the Clean Water Act." Compl. at ¶ 29. The second cause of action alleges that the EPA's denial of plaintiffs' January 13, 1999 petition requesting repeal of 40 C.F.R. § 122.3(a) was "arbitrary, capricious, an abuse of discretion and not in accordance with the Clean Water Act." Id. at ¶ 32.

Defendant does not challenge the timeliness of the second cause of action. Defendant does, however, argue that the first cause of action, challenging EPA's initial promulgation of the regulation, is untimely under the six year statute of limitations provided in 28 U.S.C. § 2401(a) ("Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. . ."). Section 2401(a) does generally apply to actions brought under the APA. Wind River Mining Corp. v. United States, 946 F.2d 710, 713 (9th Cir. 1991). Given that 40 C.F.R. § 122.3(a) was first promulgated in 1973, defendant argues that the cause of action is clearly time-barred. See 38 Fed.Reg. 13, 528 (May 22, 1973).

In Wind River, the Ninth Circuit held that challenges to procedural violations in the adoption of regulations and policy-based challenges must be brought within six years of a regulation's promulgation. Wind River, 946 F.2d at 715-16. It also held, however, that a substantive challenge to an agency decision alleging that the agency lacked constitutional or statutory authority to make the decision may be brought within six years of the application of that agency decision to the challenger, as an "as applied" challenge. Id. In so deciding, the Ninth Circuit specifically approved the reasoning of the D.C. Circuit in Oppenheim v. Coleman, 571 F.2d 660 (D.C. Cir. 1978).

Cases following Wind River, including cases from other circuit courts, have specifically allowed *ultra vires* challenges to regulations when filed within six years after the agency takes action based on the regulation. See Natural Resources Defense Council, Inc. v. Evans, 279 F.Supp.2d 1129, 1148 (N.D. Cal. 2003); Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service, 378 F.3d 1059, 1075-76 (9th Cir. 2004); Legal Environmental Assistance Foundation, Inc. v. U.S. Environmental Protection Agency, 118 F.3d 1467, 1473 (11th Cir. 1997)("LEAF v. EPA"); Public Citizen v. Nuclear Regulatory Commission, 901 F.2d 147, 152 (D.C. Cir. 1990).

The parties dispute whether this case can fairly be classified as an "as applied" challenge. Defendant argues that it cannot, because the EPA did not "apply" 40 C.F.R. § 122.3(a) to plaintiffs. Plaintiffs argue that the case should be classified as an "as applied" challenge, since the EPA could not deny plaintiffs' petition without applying the regulation in the process.

This Court agrees with plaintiffs, and with the numerous courts which have held that "a claim that agency action was violative of statute may be raised outside a statutory limitations period, by filing a petition for amendment or rescission of the agency's regulations." Public Citizen, 901 F.2d at 152; LEAF v. EPA, 118 F.3d at 1473; Advance Transp. Co. v. United States, 884 F.2d 303, 305 (7th Cir. 1989); EPIC, 266 F.Supp.2d at 1121.

Here, plaintiffs clearly brought a petition to the EPA requesting rescission of the regulation in question, based on the EPA having acted in excess of its statutory authority by issuing it. The Court finds that plaintiffs' challenge is an "as applied" challenge, which accrued when the EPA rejected its petition on September 9, 2003. Therefore, this Court finds, as did the Eleventh Circuit in LEAF v. EPA, that it can "entertain [plaintiffs'] contention that the regulations upon which EPA relies are contrary to the statute and therefore invalid, regardless of the fact that [plaintiffs'] challenge is brought outside the statutory period for a direct challenge to the regulations." 118 F.3d at 1473.

Plaintiffs' claim under the first cause of action is not time-barred under 28 U.S.C. § 2401(a).

3. Review of 40 C.F.R. § 122.3(a)

Under Chevron, plaintiffs argue that Congress "has directly spoken to" the issue of whether the EPA

must implement NPDES permit requirements for discharges incidental to the operation of a vessel, including ballast water. Plaintiffs refer to the language of the Clean Water Act in support of their claim. The Court agrees that the language of the Clean Water Act directly states that the EPA must form NPDES permit requirements for discharges incidental to the normal operation of a vessel, including ballast water.

A. The Clean Water Act

The CWA prohibits the "discharge of any pollutant" except as authorized by an NPDES permit. 33 U.S.C. §§ 1311(a), 1342(a). An activity is subject to NPDES permit requirements when it 1) discharges, i.e. adds, 2) a pollutant 3) to navigable waters 4) from 5) a point source. Committee to Save Mokelumne River v. East Bay Municipal Utility District, 13 F.3d 305, 308 (9th Cir. 1993). The term "discharge of any pollutant" is defined by the CWA as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). The term "pollutant" includes solid waste, sewage, garbage, and biological materials. 33 U.S.C. § 1362(6). The "navigable waters" include "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). A "point source" under the CWA includes "any . . . vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

First, ballast water discharges constitute a "discharge" or "addition" under the CWA. If a pollutant has been introduced into navigable waters "from the outside world," it meets the definition of "addition" under the CWA. Catskill Mountains Chapter of Trout Unlimited v. City of New York, 273 F.3d 481, 491 (2d Cir. 2001). Ballast water discharges clearly introduce biological materials from outside sources, as demonstrated in the introduction of the zebra mussel in the Great Lakes Region. GAO Report at 3.

Second, the discharged ballast water and other discharges incidental to the operation of a vessel constitute "pollutants" under the CWA. See National Wildlife Federation v. Consumers Power Co., 862 F.2d 580, 583, 586 (6th Cir. 1988) (finding that fish and fish remains are "pollutants" because they constitute "biological materials" under the CWA). It is not contested that ballast water can contain "biological materials," such as fish and other forms of aquatic life. EPA Report at 4.

Third, defendant does not dispute that the rivers, lakes and harbors where ballast discharges occur are "navigable waters" under the CWA. Plaintiffs specifically reference the San Francisco Bay and the Great

Lakes, which clearly constitute "the waters of the United States" under 33 U.S.C. § 1362(7).

Finally, ballast water discharges clearly arise "from" a "point source," as vessels are specifically referenced in 33 U.S.C. § 1362(14).

The two exemptions for vessel discharges from the CWA do not apply in this case. The CWA excludes from the definition of "discharge of a pollutant" the addition of a pollutant to the "contiguous zone" or "ocean." 33 U.S.C. § 1362(12)(b). The "contiguous zone" refers to the zone three miles from shore and extending for twelve miles. 33 U.S.C. § 1362(9). The "ocean" extends beyond the "contiguous zone." 33 U.S.C. § 1362(10). The CWA also excludes from the definition of "pollutant" any "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" 33 U.S.C. § 1362(6)(a). These discharges are regulated by 33 U.S.C. § 1322.

The challenged regulation does not pertain to these exemptions. Instead, given the clear language of the CWA, the statute requires that discharges of pollutants from non-military vessels into the nation's lakes, rivers, and harbors occur only under the regulation of an NPDES permit. The Court finds that the language of the CWA demonstrates the "clear intent" of Congress to require NPDES permits before discharging pollutants into the nation's navigable waters.

B. Congressional acquiescence

Defendant does not contest this interpretation of the language of the CWA with respect to its passage in 1972. Instead, defendant argues that its denial of the plaintiffs' petition in 2003 was reasonable because Congress has assented to the EPA's interpretation of the CWA in 40 C.F.R. § 122.3(a) in the thirty years since its promulgation.

Defendant argues that the length of time the regulation has been in effect, and Congress' failure to revise or repeal the regulation exempting "any other discharge incidental to the normal operation of a vessel" from NPDES permit requirements, constitute persuasive evidence that Congress intended the interpretation taken by the EPA. This argument fails for a number of reasons.

First, defendant asks the Court to consider the length of time that the regulation has been in effect to determine Congressional intent, relying on National Muffler Dealers Association, Inc. v. United States, 440

U.S. 472 (1979). However, National Muffler is a pre-Chevron case. Moreover, in that case the Court found that the statute in dispute "ha[d] no well-defined meaning . . . It is a term so general as to render an interpretive regulation appropriate." Id. at 477. By contrast, in this case the discharges that fall within the NPDES permit requirements under the CWA are clearly articulated and there is a "well-defined meaning." Therefore, under Chevron, the Court is not required to determine whether the EPA's decision on plaintiffs' petition was a "reasonable" interpretation; rather, the Court is required to determine if the regulation reflects the "unambiguously expressed intent of Congress."

Defendant then asserts that Congress has repeatedly addressed the CWA and discharges incidental to a vessel, which gave rise to 40 C.F.R. § 122.3(a); therefore, Congress' refusal to override the EPA's construction of the regulation demonstrates that it "acquiesced" to the EPA's interpretation. This argument is factually and legally flawed.

Defendant relies primarily on two cases, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) and Bob Jones University v. United States, 461 U.S. 574, 601 (1983). In Riverside Bayview, plaintiffs challenged an Army Corps of Engineers regulation, promulgated under the CWA, which included definitions of "wetlands" and "waters of the United States" in the course of regulating discharges of fill material into wetlands adjacent to navigable waters. The Court found through the legislative history that Congress acquiesced to the agency's definition and upheld the regulation. Id. at 138. In Bob Jones University, the Court found that Congress, by failing to pass bills overturning the regulatory provision, had "affirmatively manifested its acquiescence" in an IRS policy revoking tax-exempt status for a university that engaged in racial discrimination.

More recently, however, the Supreme Court has cautioned that courts should recognize congressional acquiescence only "with extreme care." Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 169 (2001) ("SWANCC"). The Court noted that there is a tenuous relationship between the actions of the session of Congress that enacted the statute and later actions or inactions by other sessions of Congress. Id. at 170. Because "subsequent history is less illuminating than the contemporaneous evidence. . . [the agency] face[s] a difficult task in overcoming the plain text and import of [the statute]." Id.

As in Riverside Bayview, SWANCC addressed regulations relating to the definition of "navigable waters" under the CWA as applied to wetlands. In light of the high standard which applies, the Court found that the agency's expansion of the definition of "navigable waters" to include nonnavigable, isolated waters under the CWA was in excess of its jurisdiction. The Court distinguished Riverside Bayview because in that case Congress had demonstrated its "unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters . . . We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up' with the 'waters' of the United States." Id. at 167.

In order to demonstrate the difficulty in proving congressional acquiescence, the Court in SWANCC distinguished Bob Jones University:

> In Bob Jones University v. United States, 461 U.S. 574 (1983), for example, we upheld an Internal Revenue Service Revenue Ruling that revoked the tax-exempt status of private schools practicing racial discrimination because the IRS' interpretation of the relevant statutes was "correct"; because Congress had held "hearings on this precise issue," making it "hardly conceivable that Congress–and in this setting, any Member of Congress–was not abundantly aware of what was going on"; and because "no fewer than 13 bills introduced to overturn the IRS' interpretation" had failed. Absent such overwhelming evidence of acquiescence, we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation.

Id. at 170.

In this case, nothing defendant presents in support of its congressional acquiescence theory comes close to the "overwhelming evidence of acquiescence" required by the Supreme Court in SWANCC. For example, defendant presents no evidence of Congress' consideration of and refusal to pass a statute overturning the EPA's exemption for discharges incidental to the normal operation of a vessel found in 40 C.F.R. § 122.3(a).

Instead, defendant points to congressional enactment of two other statutes – (1) the Non-indigenous Aquatic Nuisance Prevention and Control Act ("NANPCA"), 16 U.S.C. § 4701, as re-authorized and amended by the National Invasive Species Act of 1996 ("NISA"); and (2) the Act to Prevent Pollution from Ships ("APPS"), 33 U.S.C. §§ 1901 et. seq., which was enacted in 1980 – to demonstrate that Congress has acquiesced to the regulation by dealing with invasive species. Neither performs the "difficult task [of] overcoming the plain text and import of" the CWA. Id. at 170.

NANPCA/NISA (hereinafter "NISA") established a program to develop regulatory requirements for ballast water to control invasive species and directed the Coast Guard, instead of the EPA, to oversee the program. However, NISA clearly was not intended to limit the CWA with respect to ballast water discharges; Congress so stated in the text of NISA itself.[3] Additionally, NISA only addresses aquatic nuisance species from ballast water. It does not address the many other types of pollutants found in ballast water, such as sediment, debris, rust, and interior coatings that have flaked off the inside walls of ballast tanks. See Andrew N. Cohen and Brent Foster, The Regulation of Biological Pollution: Preventing Exotic Invasions From Ballast Water Discharged into California Coastal Waters, 30 Golden Gate U. L. Rev. 787, 790-92, 799-801 (2000). Therefore, the Court finds that NISA does not demonstrate Congress' intent to recognize the EPA's regulation under 40 C.F.R. 122.3(a), as it specifically prevents preemption of the CWA.

The other statute defendants rely on, APPS, implements the provisions of the 1973 "International Convention for the Prevention of Pollution from Ships" ("MARPOL"). With APPS, Congress established a regulatory mechanism to implement domestic responsibilities under MARPOL, which was delegated to the Coast Guard. However, the law contained a savings clause which is inconsistent with the argument that APPS demonstrates Congress' intent to limit the CWA: "Remedies and requirements of this chapter supplement and neither amend nor repeal any other provisions of law, except as expressly provided in this chapter." 33 U.S.C. § 1907(f). Defendant argues that the savings clause tips in its favor, because 40 C.F.R. § 122.3(a) was in effect at the time of APPS's passage and so the savings clause must endorse the regulation as written. However, a general savings clause regarding the CWA cannot be read to endorse an action taken by an agency that directly contradicts the CWA. At the very least, the general savings clause does not present "overwhelming evidence of acquiescence."

Defendant also argues that Congress must have recognized 40 C.F.R. § 122.3(a) because Congress has "comprehensively revisited" the CWA in 1997, 1981, and 1987, and has not overridden the regulation.

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[3] See 16 U.S.C. § 4711(b)(2)(C)("The regulations issued under this subsection shall . . . not affect or supersede any requirements or prohibitions pertaining to the discharge of ballast water into waters of the United States under the Federal Water Pollution Control Act") and 16 U.S.C. § 4711 (c)(2)(J)("The voluntary guidelines issued under this subsection shall . . . not affect or supersede any requirements or prohibitions pertaining to the discharge of ballast water into waters of the Untied States under the Federal Water Pollution Control Act . . . ").

However, this is not the Overwhelming evidence required by SWANCC; indeed, Congress did not directly discuss regulation of ballast water discharges and other discharges incidental to the operation of a vessel, nor did Congress reject a bill overturning 40 C.F.R. § 122.3(a). Nor does excluding vessels of the Armed Forces from NPDES permit requirements (see 33 U.S.C. § 1322(a)(12)) suggest approval of or application to non-military vessels.

The Deep Seabed Hard Mineral Resources Act ratified the EPA's regulation that asserted CWA jurisdiction over discharges from vessels associated with commercial recovery or exploration. 30 U.S.C. § 1419(e). Under the statute, these vessels will not be considered a "vessel or other floating craft" under 33 U.S.C. § 1362(12)(B), a provision that exempts the discharge of pollutants by "vessels" in the contiguous zone or the ocean from the definition of "discharge of a pollutant" under the Act. Therefore, by implementing 30 U.S.C. § 1419(e), Congress expanded NPDES permit requirements to include discharges by vessels associated with commercial recovery or exploration beyond three miles from the shoreline. Defendant argues that this expansion of the NPDES permit requirements simultaneously endorses the EPA's drastic exclusion from the NPDES system by 40 C.F.R. § 122.3(a). Defendant does not provide any legislative history suggesting that Congress was faced with a bill proposing the rejection of 40 C.F.R. § 122.3(a), nor does defendant explain how the expansion of the scope of the CWA in this instance implicitly ratified the regulation in question.

Therefore, the Court finds, after evaluating defendant's claim with "extreme care," that defendant has not demonstrated "overwhelming evidence of acquiescence" by Congress with respect to the NPDES permit exemption in 40 C.F.R. § 122.3(a), as required by SWANCC.

C. Summary

The Court finds that the Congress has "directly spoken" in the CWA and specifically requires NPDES permits for vessels discharging pollutants in the nation's waters. The Court also rejects defendant's argument that Congress acquiesced to the EPA regulation exempting "discharges incidental to the operation of a vessel" in 40 C.F.R. § 122.3(a). Given the Court's finding that Congress has "directly spoken" on the question before the Court today, it is "the end of the matter" and the Court, as well as the EPA, must give effect to the

unambiguously expressed intent of Congress. Chevron, 467 U.S. at 842-43.

Therefore, the Court finds that EPA acted in excess of its statutory authority under 5 U.S.C. § 706(2)(C) in exempting an entire category of discharges from the NPDES permit program and denying plaintiffs' petition to rescind 40 C.F.R. § 122.3(a). See NRDC v. Costle, 568 F.2d 1369, 1377 (D.C. Cir. 1977) (EPA did not have authority to exclude categories of point sources from NPDES permit program). Based on this finding, the Court GRANTS plaintiffs' motion for summary judgment; DECLARES that the EPA's exclusion from NPDES permit requirements for discharges incidental to the normal operation of a vessel at 40 C.F.R. § 122.3(a) is in excess of the agency's authority under the Clean Water Act; and ORDERS the EPA to repeal the regulation. ie! EPA Must Enforce Clean H2O Act & Ballast H2

CONCLUSION Needs NPDES permits

For the foregoing reasons, the Court DENIES defendant's motion for summary judgment [Docket # 37]; GRANTS plaintiffs' motion for summary judgment [Docket # 12]; and ORDERS the defendant to repeal 40 C.F.R. § 122.3(a).

The parties are ordered to appear for a further case management conference on **Friday, April 15, 2005 at 2:30 p.m. to discuss further proceedings in this action.**

IT IS SO ORDERED.

Dated: March 30, 2005

S/Susan Illston
SUSAN ILLSTON
United States District Judge

United States District Court
For the Northern District of California

U.S.News & WORLD REPORT

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Nation & World

Invasion of the Zebra Mussels

How political gridlock is helping a pesky mollusk gum up the Great Lakes

By Bret Schulte
Posted 2/25/07

The increasingly clean water of the Great Lakes would appear to signal a healthy ecosystem. In Lake Erie, water clarity now goes as deep as 30 feet. But under that crystal surface lurks a dark reality: The sparkling water is the result of an explosion of zebra mussels, a Russian mollusk that sucks up nutrients with ruthless efficiency. The result is chaos for the fishing industry and other wildlife, as well as growing maintenance problems for boats and port facilities. One key link in the food chain-the tiny crustacean diporeia-has plummeted 99 percent in some lake areas since the mussels began taking hold in the late 1980s. "Diporeia are being starved," says Jennifer Nalbone of the environmental group Great Lakes United, "because the zebra mussel is consuming their food."

DAMAGE. Dead fish lie along the shore of Lake Michigan. ANDY KLEVORN-*LUDINGTON DAILY NEWS*/AP

From 1993 to 2003, rapidly multiplying zebra mussels caused $3 billion in damage to the Great Lakes region, crippling the fishing industry while rapidly colonizing everything from turtles to boats. One Michigan town lost water for three days after a mussel colony clogged its water-intake pipe. The mussels are one of about 180 foreign species of all kinds that have invaded the Great Lakes, largely by hitching a ride on overseas shipping vessels. And many have spread through streams and lakes to affect other states. Locals say cries for federal help have yielded little in return. As a result, a patchwork quilt of tough state laws is emerging, frustrating the shipping industry and prompting Washington to take another shot at enacting blanket federal rules.

Ballast. At the heart of the battle is the shipping industry. When cargo vessels are light, they take on water for

stabilization. Called ballast water, it's often teeming with stowaways in the form of small organisms, eggs, and plant matter. When the water is released, so are they. The amount of ballast water may vary with the cargo; even laden ships still carry some water swishing in their tanks. The problem hit the Great Lakes with the 1959 opening of the St. Lawrence Seaway, which cleared a path for large cargo ships from the Atlantic. Congress attempted to stem the problem in 1990 with the Nonindigenous Aquatic Nuisance Prevention and Control Act, which forced ships to exchange ballast water hundreds of miles from shore before entering the Great Lakes. Though the law has been expanded to all U.S. waters, critics like Phyllis Windle of the Union of Concerned Scientists say that "it's increasingly behind the times." New technology such as ultraviolet light or deoxygenation can kill many organisms but is still not widely used. And while the law allows ships designated as "No Ballast on Board" to dock freely, these ships still carry low levels of water from which organisms seep out.

Many states have had enough. California, Oregon, and Washington have passed strict regulations for ballast water. But the toughest of all is Michigan, which as of January requires oceangoing vessels at its ports to obtain a permit by proving to officials they will not discharge contaminated water. Wisconsin, which has spent over $5 million in the past four years fighting invasive species, may follow the lead. Wisconsin state Rep. Louis Molepske, who recently introduced legislation, says, "We will not sit back while our waters are destroyed."

The state rules have dismayed the shipping industry, which argues that the array of permits and regulations is costly and time consuming. The shipping industry took another blow in 2005, when a federal judge ruled that ballast water is a pollutant and must be regulated by the EPA under the Clean Water Act. The EPA is appealing, arguing the act is more appropriate for stationary pollution sources. Congress is looking at a permanent fix after several attempts in recent years were stalled by competing bills or key committee chairmen seeking to use the legislation as a trading chip for their own priorities.

In coming weeks, Michigan Sen. Carl Levin will introduce a bill with tough new standards on ballast discharge that he hopes will encourage vessels to install technology that kills a large percentage of biomatter. But even Levin's office worries about the proposal's fate. Because the legislation wouldn't supersede state laws, the shipping industry is likely to fight. That could mean more gridlock. "The integrity of the Great Lakes," laments Nalbone, "is being erased by our inability to act." The last best hope may be to find some integrity in Washington.

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